

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONYA RENEE JONES,

Defendant-Appellant.

UNPUBLISHED

April 13, 2004

No. 245896

Isabella Circuit Court

LC No. 02-000501-FH

Before: O’Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals as of right her conviction after a jury trial of conspiracy to deliver, manufacture, or create methamphetamine, MCL 333.7401(2)(b)(i). This case arises out of defendant’s attempt to purchase red phosphorous, a substance used to manufacture methamphetamine. We affirm.

Defendant first argues that the court should not have admitted out-of-court statements made by her co-conspirators. We disagree.

A trial court’s exclusion of evidence is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Unless independent proof of a conspiracy is shown by a preponderance of the evidence, out-of-court statements of a co-conspirator are not admissible. *People v Vega*, 413 Mich 773, 780; 321 NW2d 675 (1982). A conspiracy may be established by circumstantial evidence. *People v Gay*, 149 Mich App 468, 471; 386 NW2d 556 (1986), citing *People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974), overruled on other grounds *People v Hardiman*, 466 Mich 417, 646 NW2d 158 (2002). Evidence of concert of action leads to an inference of a conspiracy. *People v Cotton*, 191 Mich App 377, 393-394; 478 NW2d 681 (1991). Our review of the record indicates that the prosecutor sufficiently established by a preponderance of the evidence that a conspiracy existed, independent from out-of-court statements of co-conspirators. The evidence before the jury when Sibley took the stand revealed that “Tonya McNulty” had made arrangements to purchase red phosphorous at a highly inflated price, that “Tonya McNulty” was working in concert with a man, that defendant arrived at the fertilizer store the same day “Tonya McNulty” requested directions, that McNulty had purchased iodine, and that iodine and red phosphorous are two ingredients for methamphetamine. This evidence was sufficient circumstantial evidence of a conspiracy to manufacture methamphetamine. Thus, the out-of-court statements made by defendant’s co-conspirators were admissible under MRE 801(d)(2)(E). *Vega, supra* at 780.

Defendant next argues that a mistrial should have been granted after a detective testified that he arrested her on an out-of-state warrant. We disagree.

This Court reviews the trial court's denial of a motion for mistrial for an abuse of discretion. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000). A mistrial should only be granted where a trial irregularity is prejudicial to a defendant's rights or impairs the defendant's ability to obtain a fair trial. *People v Griffis*, 218 Mich App 95, 99-100; 553 NW2d 642 (1996), citing *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). Generally, "[a]n unresponsive, volunteered answer to a proper question" does not warrant a mistrial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), citing *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

In this case the detective's statement was unresponsive to the question posed, and was simply information volunteered by the detective. When a motion for a mistrial is premised on the unsolicited outburst of a witness, it should only be granted where the comment is so egregious that the prejudicial effect cannot be cured. *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). Prejudice is shown either by conviction of an innocent defendant or error that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The court found no prejudice by the statement, but still offered to give a curative instruction. The court properly exercised its discretion. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant next argues that she should have been permitted to impeach the testimony of her co-conspirator with his prior conviction for manufacturing methamphetamine. We disagree.

We review a trial court's evidentiary ruling for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). A witness's credibility may be impeached with prior convictions if the convictions satisfy the requirements in MRE 609. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). A conviction is admissible under MRE 609(a)(1) only if dishonesty or false statement is an actual element of the offense. *People v Allen*, 429 Mich 558, 593-594 n 15; 420 NW2d 499 (1988). Because dishonesty or false statement is not an element of manufacturing methamphetamine, the co-conspirator's conviction was not admissible for impeachment purposes under MRE 609(a)(1). *Id.*

MRE 609 also allows the use of prior convictions where the crime contained an element of theft, was punishable by imprisonment of more than a year, and its probative value outweighs any prejudicial effect. MRE 609(a)(2). Producing methamphetamines did not contain an element of theft. Therefore, the prior drug conviction was inadmissible under MRE 609(a)(2). While MRE 609 does not prohibit the use of prior convictions to rebut specific statements of a defendant who testifies at trial, *People v Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985), the co-conspirator was not a defendant in the instant case, and he admitted that he previously manufactured methamphetamine but lied to police when asked. Therefore, the prior conviction could not rebut the co-conspirator's testimony.

Defendant next argues that the court should not have permitted one of the detectives to testify as an expert witness. We disagree.

This Court reviews for an abuse of discretion a trial court's determination whether a witness is qualified as an expert and whether the testimony is admissible. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). MRE 702 permits a witness to testify as an expert when the witness has specialized knowledge, experience, training, or education. "Gaps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility." *People v Gambrell*, 429 Mich 401, 408; 415 NW2d 202 (1987). Instead, whether expert testimony is admissible is determined by whether it will help the factfinder decide the case. *People v Smith*, 425 Mich 98, 105; 387 NW2d 814 (1986). Because the detective's explanation regarding how methamphetamine was manufactured helped the jurors determine whether defendant was guilty of conspiring to manufacture methamphetamine, the court did not abuse its discretion by permitting the detective to testify as an expert witness. *Id.*

Defendant next claims the court should have substituted appointed counsel. We disagree.

A trial court's decision whether to allow substitution of counsel is reviewed for an abuse of discretion. *People v T aylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). A defendant who is entitled to an appointed attorney may not choose his attorney; however, he may be allowed to replace counsel if he can demonstrate adequate cause for replacement. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). When a defendant claims that he has cause to replace his attorney, the trial court should hear the claim and, if it is disputed, hear testimony and give findings and conclusions. *Id.* at 441-442. In the instant case, the court had ample justification to deny defendant's motion for appointed counsel where it considered all defendant's reasons and determined that good cause for substitution did not exist. *Id.*¹

Defendant next argues that the court abused its discretion by allowing the detective to give a victim-impact statement at the sentencing hearing. We disagree.

"If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." *People v Garza*, 469 Mich 431, 432-433; 670 NW2d 662 (2003), citing MCL 769.34(10). The minimum sentence imposed by the trial court was within the guidelines' range. Defendant does not claim the information given by the detective was inaccurate; thus, defendant's sentence must be affirmed. *Id.*

¹ The trial court did not err in denying defendant's motion for a continuance so she could hire her own counsel. A defendant's right to choose counsel should be balanced against the interest of "prompt and efficient administration of justice." *People v Kryztopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988), citing *Wilson v Mintzes*, 761 F2d 275, 280 (CA 6, 1985). It was not an abuse of discretion to deny the motion where defendant waited two months before deciding to seek different counsel and did not request to hire counsel of choice until the second day of trial. *Id.*

Defendant next claims that information was inadvertently included with her PSIR and requests remand to the trial court to have the information removed. We decline to do so.

Defendant did not challenge the alleged irrelevant information at trial and cites no authority to support her request to remand. Claims that are not supported by legal authority are deemed abandoned on appeal. *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997). Further, because defendant does not demonstrate error affecting her substantial rights, relief is not warranted. *People v Callon*, 256 Mich App 312, 332; 662 NW2d 501 (2003), citing *People v McCrady*, 244 Mich App 27, 32; 624 NW2d 761 (2000).

Affirmed.

/s/ Peter D. O'Connell

/s/ Kathleen Jansen

/s/ Christopher M. Murray